

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

**WILLIAM G. EVANS and
JEANNETTE M. EVANS,**

Appellants,

v.

**STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,**

Respondents.

PCHB NO. 93-256

**ORDER GRANTING
MOTION TO DISMISS**

I

The appellants, William G. Evans, and his wife, Jeannette M. Evans ("Evans"), appealed to the Pollution Control Hearings Board ("Board"), a September 3, 1993 letter written by the Department of Ecology ("Ecology").

II

Ecology, on January 13, 1994, filed a motion to dismiss the appeal. Ecology argued that its September 3 letter was not a final decision, and therefore, not appealable.

III

The Evans filed an opposing memorandum on February 3, 1994. Ecology filed a reply on January 31, 1994.

IV

The Board held a telephonic hearing on the motion on February 22, 1994. The Evans were represented by Mark E. Fickes, attorney, with Velikanje, Moore & Shore, Inc. Ecology was represented by Jo Messex Casey, Assistant Attorney General. The proceeding was recorded by Louise M. Becker, court reporter, affiliated with Gene Barker and Associates of Olympia.

V

Mr. Evans applied to Ecology for a state ground water permit for supplemental irrigation, with frost protection, on December 14, 1988. The request was for 2000 gallons per minute. The Evans Ranch had water right approvals for two wells, but requested the third well to provide an additional instantaneous quantity of water. Ecology issued a Report of Examination recommending approval on April 11, 1991. The Report, because of water availability problems in the upper aquifers, required that the well be cased into the first aquifer lying at or below 1800 feet below the land surface. No appeal was ever taken from this Report or approval.

VI

The well lies on the south slope and approximately six miles south of the crest of the Rattlesnake Hills. In this area, the basalt rock layers generally dip away from the crest of the Rattlesnake Hills. This does not allow for good retention of water in the permeable zones.

VII

The water bearing formations in the area may be divided into four groups: 1) the uppermost layer (found down to 100 feet below the land surface) known as the Ellensburg Formation; 2) the Saddle Mountains Basalt Formation (found at elevations between 100 and 700 feet); 3) the Wanapum Formation (found between 700 and 1800); and 4) the Grande Rhonde Basalt Formation (found below 1800 feet).

VIII

The Ellensburg Formation provides water for domestic and other small uses. Ecology determined that the Saddle Mountain Formation would not provide the quantity of water requested. The Wanapum Formation was regarded as fully appropriated. That left only the Grande Rhonde Basalt Formation available for the quantity of water requested.

IX

The Evans drilled the well to a depth of approximately 3500 feet, without encountering the Grande Rhonde Basalt Formation. They requested permission from Ecology, in a letter dated August 23, 1993, to tap into the Wanapum aquifer. In their request they argue that the 1988 Report of Examination is inconclusive, in regards to the effect of the Evans well, were it to draw from the Wanapum aquifer.

X

Ecology responded in a letter of September 3, 1994, in which it responded that it lacked the authority to modify the existing permit, absent an application from the Evans to amend their permit. The letter related that the Evans had chosen not to appeal Ecology's 1988 decision regarding this well. The letter also stated that Ecology continues to be concerned about allowing tapping into the Wanapum aquifer. There is no record that the Evans have filed a proper amendment to their permit.

XI

We conclude that the Evans are barred by the doctrine of res judicata from overturning Ecology's 1988 approval, limiting withdrawal to the Grande Rhonde Basalt Formation. Homeowner's Ass'n. v. Island County, 72 Wn. App. 91, 98, ___ P.2d ___ (1993).

XII

Ecology may determine, through review of a properly filed amendment to the permit, that there is a substantial change of circumstances, since its earlier decision, to allow a change. Id. at 96 That question, however, is not before us. No proper application has been filed.

XIV

It follows that Ecology's letter is not an appealable order. The Board may hear appeals of orders and decisions of Ecology which require adjudication. RCW 43.21B.110(1)(a)(f).

1
2 This case does not involve a regulatory order. Adjudicative proceedings are defined the
3 Administrative Procedure Act as:

4 a proceeding before an agency in which an opportunity for hearing before that agency
5 is required by statute or constitutional right before or after the entry of an order by the
6 agency.

6 RCW 34.05.010(1). Order is defined by that act as:

7 a written statement of particular applicability that finally determines the legal rights,
8 duties, privileges, immunities, or other legal interests of a specific person or persons.

9 RCW 34.05.010(10)(a) Ecology's 1988 approval was an order. Its September 3, 1993 letter
10 is not. It was merely an explanation of the effect of the 1988 order, and the procedure for
11 filing an amendment to that order. The statement by the letter's author that it was his belief
12 that a new application "would almost certainly be denied," do not satisfy the statutory
13 requirement for finality, necessary to invoke the jurisdiction of the Board.

14 **XIV**

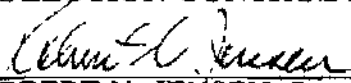
15 Based on the foregoing analysis, the Board enters the following:

16 **ORDER**

17 Ecology's Motion to Dismiss is granted.

18 DONE this 18th day of March, 1994.

19 **POLLUTION CONTROL HEARINGS BOARD**

20 
21 ROBERT V. JENSEN, Presiding Officer

22 
23 RICHARD C. KELLEY, Member

24 P93-256D